Consolidation Coal Company, Robinson Run Mine No. 95 *and* United Mine Workers of America, District 31. Case 6–CA–23681

June 25, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On January 17, 1992, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Consolidation Coal Company, Robinson Run Mine No. 95, Shinnston, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT deny the request of our employees for representation by District 31 board members at investigatory interviews which could result in their discipline if the District 31 board member requested is readily available to provide such representation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them in Section 7 of the National Labor Relations Act.

WE WILL grant the request of our employees for representation by District 31 board members if readily available at investigatory interviews that could result in employee discipline.

CONSOLIDATION COAL COMPANY

Patricia J. Scott, Esq., for the General Counsel.
Daniel L. Fassio, Esq., of Pittsburgh, Pennsylvania, and *Robert M. Steptoe Jr., Esq.* and *David M. Hammer, Esq.*, of Clarksburg, West Virginia, for the Respondent.
Carlo Tarley, Executive Board Member, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On June 12 and July 24, 1991, United Mine Workers of America, District 31 (the Union), filed a charge and first amended charge, respectively, against Consolidation Coal Company (Respondent).

On July 24, 1991, the National Labor Relations Board, by the Acting Regional Director for Region 6, issued a complaint, which was later amended, which alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act), when it denied the request of its employee Robert Knisely to be represented by United Mine Workers of America, District 31 Board Member Carlo Tarley at an investigatory interview which could have resulted in the discipline of Robert Knisely.

Respondent filed an answer in which it denies it violated the Act in any way.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent defends its conduct by arguing, inter alia, that its general superintendent was merely following the contractual grievance procedure when he refused to allow the District 31 executive board member to serve as Robert Knisely's representative at the investigatory interview held on June 10, 1991. This argument lacks merit. Even assuming that any restrictions that may pertain to the grievance process would have been applicable had a grievance been filed, no grievance involving Knisely was pending at the time of the June interview.

[2] In par. 1(b) of his recommended Order, the judge used the broad cease-and-desist language ''in any other manner.'' However, we have considered this case in light of the standards set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), and have concluded at this time that the narrow cease-and-desist language ''in any like or related manner'' is appropriate. We shall modify the judge's recommended Order accordingly.

A hearing was held before me in Fairmont, West Virginia, on September 19, 1991.[1]

I find that Respondent did violate the Act as alleged in the complaint.

Upon the entire record in this case, to include posthearing briefs submitted by the General Counsel and Respondent, and upon my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation with an office and place of business at the Robinson Run Mine No. 95 near Shinnston, West Virginia, has been engaged in the mining and nonretail sale of coal.

During the 12-month period ending May 31, 1991, Respondent, in the course and conduct of its business operations, sold and shipped from its West Virginia facilities, products, goods, and materials valued in excess of $50,000 directly to points outside the State of West Virginia.

Respondent admits, and I find, that it is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the United Mine Workers of America, District 31, is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

On Wednesday, June 5, 1991, Robert Knisely, a motorman, and Charles Cienowski, his coworker, both of whom are employees of Respondent and represented by the Union were involved in an incident at work which included a derailment.

On Saturday, June 8, 1991, Robert Knisely was informed that he was to meet at 5 p.m. on June 10, 1991, at the start of his shift, with Thomas ''Pete'' Simpson, the general superintendent of Robinson Run Mine No. 95. Knisely was told that the meeting with Simpson could result in his being disciplined and the discipline might include his discharge.

Knisely called Nelson Starcher, the president of UMW Local 1501. Starcher told Knisely that he would be out of town on June 10, 1991, and had asked Carlo Tarley from District 31 to take care of matters in his absence.

The Union signatory to the collective-bargaining agreement under which Knisely worked was the International Union UMW. The International's District 31 helped police collective-bargaining agreements within its jurisdiction. District 31 was broken down into two sections. The section under Executive Board Member Carlo Tarley handled Local 1501 UMW, which was Knisely's Local.

On Monday morning Knisely went to District 31's headquarters to see Tarley and told Tarley that he wanted Tarley to represent him at the investigatory interview at 5 p.m. that afternoon. Tarley agreed to represent Knisely.

Later that Monday Knisely appeared at the mine. Also present were two men from District 31, i.e., Carlo Tarley, who Knisely wanted to represent him at the investigatory interview with Thomas ''Pete'' Simpson, and Gary Jordan. Also present were three newly elected members of the mine committee, W. T. Hockenberry, Sam Marra, and Jim Parker. Hockenberry, Marra, and Parker all work at Robinson Run Mine No. 95 but none had ever represented an employee at an investigatory interview. Carlo Tarley himself had worked at Robinson Run Mine No. 95 for 20 years or until June 1989 when he became an executive board member of District 31. Tarley was officially in a leave-of-absence status from his job at Robinson Run Mine No. 95.

I credit Knisely that prior to Knisely's interview with Simpson that when Simpson said that Knisely would be allowed only one representative at the interview that Knisely said to Simpson that Tarley would be his representative and Simpson said no.

Tarley testified that Simpson said that Knisely could have only one representative at the investigatory interview and it could not be Tarley and Tarley argued with Simpson that it should be him. Simpson corroborates that Tarley was present for the Knisely interview and was told by Simpson that he could not be present during the interview and that Tarley argued that he had a right to be present.

It is clear in the extreme that Knisely wanted Tarley to represent him at the investigatory interview and Respondent knew it and it is an insult to one's intelligence and common sense to suggest otherwise.

Simpson made it clear to Knisely, Tarley, and the others that Knisely could have only one representative at the investigatory interview and that it could not be Tarley or Jordan but had to be one of the three mine committeemen, none of whom had ever represented an employee at an investigatory interview. Since I find that Knisely told Simpson that he wanted Tarley to represent him Simpson denied Knisely the representative of his choice. Simpson testified that Knisely did not specifically request Tarley. I do not credit Simpson on this point. But even Simpson admits that Tarley, in Simpson and Knisely's presence, argued that he had a right to be present at the interview. No reasonable person could conclude that Simpson did not know that Knisely wanted Tarley to represent him at the investigatory interview.

Simpson told Knisely that he had to appear at the 5 p.m. investigatory interview and if he wanted representation it had to be one of the three mine committeemen. As noted all three of the mine committeemen were inexperienced in handling investigatory interviews whereas Tarley was highly experienced. Forcing Knisely to chose one of the three mine committeemen and denying his request for Carlo Tarley as his representative was the functional equivalent of forcing a defendant to select as his counsel a young lawyer who had never tried a case before over the late great trial lawyer, Edward Bennett Williams, when both were present and ready to represent the defendant. It was obvious why Knisely would want Tarley and Tarley was present and ready to represent him. No delay whatsoever would be occasioned by letting Knisely have Tarley as his representative.

Suffice it to say Simpson required that Knisely pick as his representative one of the three mine committeemen present.

[1] On this same day a hearing was held before me involving the same Respondent and the Charging Party, i.e., Consolidation Coal Company, Case 6–CA–23393. No party to the litigation moved to consolidate the two cases.

Since he could not have Tarley, Knisely selected W. H. Hockenberry to represent him. Hockenberry represented Knisely at the investigatory interview and he also represented Knisely's coworker, Charles Cienowski. Neither Knisely nor Cienowski received any discipline. This, of course, is no defense to the allegation that Respondent violated the Act in denying Knisely his choice of representative. Nor, of course, is it any defense to an alleged unlawful denial of choice of representative that the employee, like Knisely, is a college graduate, has himself represented at least one fellow employee at an investigatory interview, and is a member or former member of the mine committee and safety committee. I note that lawyers, even very talented ones, hire the best lawyers they can get if faced with legal problems. In *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), the Supreme Court approved the Board's view that Section 7 of the Act gives an employee the right to demand union representation at investigatory interviews which the employee reasonably believes could result in discipline. Respondent stipulated in the instant case that the investigatory interview that Knisely was to have with Simpson could have resulted in Knisely's being disciplined and possibly even discharged. I find as a matter of fact that Knisely requested Tarley to be his representative and expressed that desire to Respondent. Respondent did not cancel the investigatory interview but went forward with it. Respondent's refusal to let Tarley, who was present, represent Knisely at the investigatory interview was a violation of Section 8(a)(1) of the Act. See *GHR Energy Corp*., 294 NLRB 840 (1989), where a similar violation was found, i.e., it was a violation of the Act to deny an employee his choice of representative, who in that case was from the International union and present, and force the employee to proceed with another representative.

In the instant case it would not have been a violation of the Act if Respondent denied Knisely's request for representation by Tarley if Tarley was not present and to grant the request would force a postponment of the investigatory interview. See *Coca-Cola Bottling Co*., 227 NLRB 1276 (1977). But in the instant case as in *GHR Energy Corp*., supra, the requested representative was present and ready to go forward. Hence, Respondent violated Section 8(a)(1) of the Act.

The General Counsel requests a broad remedial order in this case. The Board in *Hickmott Foods*, 242 NLRB 1357 (1979), held that a broad cease-and-desist order requiring a Respondent to cease and desist from ''in any other manner'' restraining or coercing employees in the exercise of their Section 7 rights rather than the narrow ''in this or any like manner'' language should be reserved for situations where a Respondent is shown to have a proclivity to violate to Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.

The General Counsel has referred me to enough Board cases of unfair labor practices being committed by this Respondent that I will grant the application for a broad remedial order.[2] Subsequent to the hearing in this case the Board issued yet another decision finding the Respondent quilty of an unfair labor practice. See *Consolidation Coal Co*., 305 NLRB 545 (1991). On December 17, 1991, I issued my decision in *Consolidation Coal*, JD–335–91, wherein I found Respondent again violated the Act. I will recommend a broad remedial order even though evidence at the hearing reflects that Respondent is the second largest producer of coal in the United States, operates some 25 unionized mines in 7 States, and employs some 10,500 people.

[2] See the following Board cases where Respondent was found to have violated the Act: 253 NLRB 789 (1980); 256 NLRB 541 (1981); 260 NLRB 466 (1982); 263 NLRB 1306 (1982); and 266 NLRB 670 (1983).

CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District 31, United Mine Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when it denied the request of its employee Robert Knisely to be represented by United Mine Workers of America, District 31 Board Member Carlo Tarley at an investigatory interview which could have resulted in the discipline of Robert Knisely.

THE REMEDY

Having found that Respondent has engaged in this unfair labor practice it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Consolidation Coal Company, Robinson Run Mine No. 95, Shinnston, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying the requests of its employees for representation by District 31 board members at investigatory interview which could result in their discipline if the District 31 board members requested is readily available to provide such represeentation.

(b) In any other manner interfering with, restraining, or coerceing their employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Grant the request of its employees for representation by District 31 board members if readily available at investigatory interviews that could result in employee discipline.

(b) Post at its Shinnston, West Virginia facility copies of the attached notice marked ''Appendix.''[4] Copies of the no-

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

tice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.